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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 384

CECELIA S. LARSON AND RUSSELL T. THOMPSON,
Appellants,

vs.

CITY OF LONG BEACH

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IRVING M. SMITH,
City Attorney;
CLIFFORD E. HAYES,
Deputy City Attorney,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee in the above entitled cause for its statement in opposition to appellants' statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The questions sought to be presented on this attempted appeal are whether (1) the pension rights of the appellants

may be amended by appropriate legislative action after appellants have been granted pensions pursuant to charter provisions, said modification providing for the payment of a fixed pension in the amount paid on the effective date of the amendment, instead of a pension based upon the fluctuating pay of the employees of the Police and Fire Departments; (2) the modification of the pension rights is unreasonable and therefore void; and (3) a judgment in declaratory relief construing the effect of a prior amendment to the pension system is res judicata and prohibits the adoption of a subsequent charter amendment by appropriate legislative action.

The provisions of 187.2 of the Long Beach City Charter, approved in 1951 (California Statutes 1951, p. 4634); the pertinent provisions of Section 187 of the Long Beach City Charter, approved in 1925 (California Statutes 1925, p. 1333); and Section 187.1 of the Long Beach City Charter, approved in 1945 (California Statutes 1945, p. 2954) are attached to appellants' jurisdictional statement as Appendix Nos. G, H and I, respectively.

In 1925 the electorate of the City of Long Beach approved an amendment to the Charter of the City of Long Beach, designated as Section 187. Said section created a pension system in favor of certain employees in the Police and Fire Departments of the City.

In 1931 the electorate approved an amendment to Section 187. Said amendment is not involved in this action.

In 1945 the electorate of the City approved Section 187.1 of the Charter, which section repealed Section 187. The Supreme Court of California in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, held that the City of Long Beach could not deprive the employees of the Police and Fire Departments of all pension rights. At page 852 the court states: "The right to a pension becomes vested upon

the acceptance of employment." The Supreme Court in discussing the nature of pension rights, in the *Kern* case, stated as follows, beginning at page 854:

> "In the leading case of *Pennie* v. *Reis* (1889), 80 Cal. 266 [22 P. 176] (affirmed in 132 U.S. 464 [10 S. Ct. 149, 33 L. Ed. 426]), a death benefit payable to legal representatives was eliminated by the implied repeal of a pension statute, but the repealing statute substituted a more comprehensive pension system which included a death benefit payable to certain dependents. The practical result was a modification which gave the employees more pension benefits than they had before. This case therefore does not stand for the proposition than an employee may be deprived of all pension rights. *Clarke* v. *Reis*, 87 Cal. 543 [25 P. 759], and *Clarke* v. *Police etc. Ins. Board*, 123 Cal. 24 [55 P. 576], were based on the same statute and are distinguishable on the same grounds. (Cf. *Cohrn* v. *Henderson* (1912), 19 Cal. App. 89 [124 P. 1037]; *Burke* v. *Board of Trustees* (1906), 4 Cal. App. 235 [87 P. 421].)
>
> "The kind of modification that has been upheld is illustrated by *Brophy* v. *Employees Retirement System*, 71 Cal. App. 2d 455 [162 P. 2d 939], where the court sustained an amendment, made before the time for retirement, reducing the monthly amount to be paid to retired employees engaged in gainful occupations. It has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence. (*Brooks* v. *Pension Board*, 30 Cal. App. 2d 118 [85 P. 2d 956]; *Sweesy* v. *Los Angeles etc. Retirement Bd.*, 17 Cal. 2d 356 [110 P. 2d 37]; *Home* v. *Souden*, 199 Cal. 508 [250 P. 162]; *Casserly* v. *City of Oakland*, 6 Cal. 2d 64 [56 P. 2d 237]; *Brophy* v. *Employees Retirement System*, 71 Cal. App. 2d 455 [162 P. 2d 939]; *McCarthy* v. *City of Oakland*, 60 Cal. App. 2d 546, 550

[141 P. 2d 4]; *Vero* v. *Sacramento City E. R. System*, 41 Cal. App. 2d 482, 486 [107 P. 2d 82].)

"The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions.

"Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

After the decision of the Supreme Court in the case of *Kern* v. *City of Long Beach*, the appellant Thompson, together with other employees of the Police and Fire Departments, filed an action in the Superior Court of the State of California, entitled *Allen* v. *City of Long Beach*, LBC-14131, (a copy of the judgment entered in said action is attached to appellants' jurisdictional statement, Exhibit "A"—Appendix F). In this case, the appellant Thompson, and the other plaintiffs named therein, sought a declaratory judgment, declaring their rights under Section 187 of the Charter, and contended that Section 187.1, which section repealed Section 187, did not in any manner affect their rights under Section 187 of the Charter. However, the

District Court of Appeal of the State of California, (*Allen* v. *City of Long Beach; Adams* v. *City of Long Beach*, 101 Cal. App. 2d 15) held that the rights of the plaintiffs in said action were affected by Section 187.1 of the Charter and that the right of the plaintiffs to earn a pension in excess of fifty per cent (50%) of their salary by reason of longer service was repealed. The District Court of Appeal in discussing the nature of pension rights stated:

> "We therefore adopt as part of this opinion the following language from the Palaske case [p. 132]:
>
> 'Applying the principles set forth in *Kern* v. *City of Long Beach*, supra, it appears that it was within the power of the city to modify its pension plan to provide that on and after the effective date of the amendment an employee who was entitled to retire might do so or not, as he saw fit, but that if he chose to continue as an employee he could not thereby earn any additional pension above that to which he was entitled on the effective date of the amendment. As stated by the Supreme Court, the employee has a vested right only to a substantial or reasonable pension. His contractual right to such a pension has not been impaired by legislation which, operating prospectively, merely withdraws any right or option to earn a bonus by continuing in employment after he has become eligible for retirement.'" *Palaske* v. *City of Long Beach*, 93 Cal. App. 2d 120 [208 P. 2d 764].

Following a decision of the District Court of Appeal, the plaintiffs therein filed a petition for hearing in the Supreme Court of the State of California, which petition for hearing was denied. *Subsequently, the plaintiffs in said case perfected their appeal to this Honorable Court, contending that a statute modifying their pension rights violated the provisions of the Constitution of the State of California and the Constitution of the United States of America.*

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This Honorable Court granted the motion of the appellees therein to dismiss the appeal and affirmed the judgment.

In 1951 the electorate of the City of Long Beach approved Section 187.2 of the Charter. Under the provisions of the charter amendment, the pension payable to appellants became fixed at the amount paid to each appellant on the effective date of the amendment. Prior to the adoption of Section 187.2, each of the appellants was paid a pension based upon the fluctuating pay attached to a certain rank in the Police or Fire Department. After the effective date of Section 187.2 of the Charter (June 5, 1951) and in July and August of 1951, the City raised the pay of the employees of the Police and Fire Departments. The appellants filed these actions against the City of Long Beach, in the Municipal Court of the City of Long Beach, to recover the difference between the amount actually paid to plaintiffs and the amount which would have been paid to them had their pension been based upon the fluctuating pay of employees of the Police and Fire Departments. The trial court rendered judgments in favor of the appellants. The appellee filed appeals with the Appellate Department of the Superior Court and said court reversed the judgments of the trial court.

The appellants contend that pension rights may not be modified in any respect after a pension has been granted. The appellee contends that under California law the right of appellants is to receive a reasonable and substantial pension, and that the right is reserved to the legislative body, that is, the electorate of the City of Long Beach, to make reasonable modifications from time to time, and that there is no impairment of the contract so long as the modification is reasonable and a substantial pension is paid to each of the appellants. The appellee also contends that the pension payable to the appellants under the modification is

reasonable and the pension substantial, and that a prior judgment in declaratory relief, fixing and determining the rights of the parties under a prior charter amendment, does not prevent the electorate of the City from adopting a subsequent amendment.

II

No Substantial Federal Questions Are Presented by the Attempted Appeal

The appellee submits that no substantial questions have been raised on this appeal. The position of the appellants is that any substantial modification of their pension rights is a violation of the provisions of the Constitution of the United States. *The Supreme Court of California has held that an employee only receives a vested right to a reasonable and substantial pension.* Numerous decisions have upheld the power of the legislative body to make reasonable modifications and that said modifications do not impair vested rights. If the contract existing between the City and the employee provides for a reasonable and substantial pension, then it is a legislative function to determine the amount thereof and the courts will only interfere when the modification is unreasonable.

Appellants contend that the Supreme Court of California has never specifically held that the rights of a pensioner may be modified after retirement. However, the Supreme Court in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, at page 854, stated:

> "It has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee's salary, *and modifications have been approved in some cases when made after the happening of the contingency upon which the payments were to commence.*" (Emphasis added.)

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Thus, the Supreme Court of California recognized the rule that pension payments may be modified after retirement without impairing constitutional provisions.

The general rule throughout the United States is that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance in which the employee has no vested right in its continuance, and that such a pension is terminable at the will of the public authority.

This court, in the case of *Frisbie* v. *United States*, 39 L. Ed. 657 (157 U.S. 160), stated at page 659:

> "The pension granted by the government is a matter of bounty. *'No pensioner has a vested legal right to his pension.* Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' *Walton* v. *Cotton*, 60 U.S. 19 How. 355 (15:658); *United States* v. *Teller*, 107 U.S. 64, 68 (27:352, 354)." (Emphasis added.)

54 A.L.R. 943;
98 A.L.R. 505;
112 A.L.R. 1009;
137 A.L.R. 249.

The Supreme Court of California has declared that the vested contractual obligation created by the Charter in favor of the employees of the Police and Fire Departments of the City of Long Beach is to receive a reasonable and substantial pension with the right reserved in the legislative body to make reasonable alterations and modifications. The contract is not altered by reason of the fact that the employee is not required to perform further services. The contract remains unchanged unless altered by appropriate legislation. The Supreme Court of the State of California recognized this principle when it stated:

> "Insofar as the *time* of vesting is concerned, there is little reason to make a distinction between the periods

before and after the pension payments are due." *Kern* v. *City of Long Beach*, 29 Cal. 2d 848.

If no distinction is to be made as to the time of vesting of the employee's rights, then it follows that the power remaining in the legislative body to make reasonable changes and modifications remains a part of the contract after retirement. The courts have never held that a right may become *more vested* by the retirement of the employee.

The appellants refer to the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, and argue that the statement concerning reasonable modification was "constructive dictum." The appellee submits that the Supreme Court of California was reviewing and announcing the existing law in California on pensions. The Supreme Court quoted the "constructive dictum" with approval in the case of *Packer* v. *Board of Retirement*, 35 Cal. 2d 212. In the case of *Allen* v. *City of Long Beach*, 101 Cal. App. 2d 15, at page 20, the court answered the criticism of the language in the *Kern* case in the following manner:

> "Respondents have also suggested that the language in the Kern case relating to reasonable modifications was 'by way of dictum.' Whether this be correct or not, the language was expressly approved by the Supreme Court in the later case of *Packer* v. *Board of Retirement*, 35 Cal. 2d 212."

In the recent case of *Wallace* v. *City of Fresno*, 117 A. C. A. 929, the District Court of Appeal stated at page 931:

> "A pension law may be changed or modified and when one is placed upon the pension roll he does not obtain a vested right to any fixed or definite benefits, but only to a substantial or reasonable pension. He has a vested right to a pension, but the amount, terms

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and conditions of the benefits may be altered. (*Kern* v. *City of Long Beach*, 29 Cal. 2d 848 [179 P. 2d 799].)

The appellee submits that the question involved in this appeal is the nature of the contract existing between the appellants and the appellee. The Appellate Department of the Superior Court, in its Memorandum Opinion in the *Larson* case, construed the force and effect of the decisions of the Supreme Court of California and District Court of Appeal, and held that under California law the only vested right granted to the pensioner is to receive a reasonable and substantial pension. The court stated:

* * * * * * *

"There are three pertinent decisions since the *Kern case: Packer* v. *Board of Retirement* (1950), 35 Cal. 2d 212, 217 P. 2d 660; *Palaske* v. *City of Long Beach* (1949), 93 Cal. App. 2d 120, 208 P. 2d 764; *Allen* v. *City of Long Beach* (1950), 101 Cal. App. 2d 15, 224 P. 2d 792. After reading the opinions in these four cases we have no hesitancy in concluding that the defendant city possessed the right to make a change in the provisions of its charter concerning the rate of pay to a pensioner, so long as it left him a substantial and reasonable pension, and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension."

If the contract existing between the appellants and the appellee in effect provides for a reasonable and substantial pension and the court has so held, there can be no violation of constitutional provisions if the legislative body acts within the scope of the contract and makes provision for a reasonable and substantial pension.

The courts in several other states which followed the minority rule, which rule is to the effect that employees

receive a vested right of which they cannot be entirely deprived, have held that pension rights may be modified after retirement by appropriate legislative action.

In the case of *State ex rel. Holton* v. *City of Tampa*, 159 So. 292, the plaintiff was a retired member of the Fire Department of the City of Tampa. The City reduced the amount of pension payable and the plaintiff sued. The court, in holding that the plaintiff was not entitled to recover, stated at page 293:

> "But except in a case admitting of no other construction, a statutory retirement provision will not be construed as a contractual limitation binding on the *legislative prerogative to fix the amount* of retirement pay from time to time, so long as entire deprivation is not thereby attempted under the guise of regulation of the amount of compensation."

In the case of *City of Dallas* v. *Trammell*, 101 S. W. 2d 1009, the City of Dallas reduced the amount of pension payable to the plaintiff, a retired member of the Police Department. While the court held that the right to a pension was not a gratuity and that the pension system was a part of the contract of employment, yet the court held that the City had the right to decrease the amount of pension payable. The court at page 1017 stated as follows:

> ". . . The Legislature and the City of Dallas have manifestly sought to do no more than to meet the exigencies and necessities of the situation, and to readjust the basis of the monthly installments payable on pensions to the end that the pension fund itself may be preserved, and that each and all entitled to receive benefits from same shall share upon an equitable basis. In our opinion, the power of the Legislature and of the City of Dallas to accomplish this is certain."

This court has recognized the right of the legislative body to modify pension or annuity systems. In the case of *Dodge*

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v. *Board of Education*, 302 U. S. 74, 82 L. Ed. 57, this court had under consideration a statute of the State of Illinois which reduced the amount of pension payable to retired teachers of the City of Chicago. This court upheld the right of the State of Illinois to amend the pension system.

In the case of *Board of Trustees* v. *People*, 203 P. 2d 490, the Supreme Court of Colorado, after reviewing numerous cases, stated as follows at page 493:

> "From the principle laid down in the foregoing authorities it follows that a legislative change in the amount of the pension is not an impairment of the obligation of the contracts in violation of article II, section 11, of the Colorado Constitution."

In the case of *Talbott* v. *Independent School Dist. of Des Moines*, 299 N. W. 556, is found an extensive analysis of pension cases, and on page 563 the court stated:

> "But the fact that these retirement or disability payments are not gratuities, is not, in our judgment, sufficient to give to them the character of a property, or a vested right, or a contract right, which can not be adversely affected by subsequent legislation by either the state or a municipality . . ."
>
> *Brown* v. *City of Highland Park*, 30 N. W. 2d 798;
> *Payne* v. *Board of Trustees*, 35 N. W. 2d 553;
> *Mac Leod* v. *Fernandez*, 101 Fed. 2d 20;
> *People ex rel Malone* v. *Mueller*, 66 N. E. 2d 516.

The law is well established by this Honorable Court to the effect that this court must accept the decision of the highest court of the state, fixing the meaning of state legislation. The appellee submits that the meaning of Section 187 of the Charter has been established by the courts of the State of California and that the contract existing between the appellants and appellee only provides for a reasonable and substantial pension. Therefore, if the electorate of the

appellee City change the manner of determining the amount of pension payable to the appellants, there is no violation of constitutional provisions.

In the case of *Knights of Pythias* v. *Meyer*, 265 U. S. 30, this Court stated at page 32 as follows:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262; Green v. Neal, 6 Pet. 291, 297-300, 8 L. ed. 402, 404-406. And we follow the state construction even though it may not agree with our own opinion."

In the case of *Guarantee Trust Co.* v. *Blodgett* 287 U. S. 509, this court stated at page 512 as follows:

> "We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find."

And again, at page 513, this court stated:

> "Since the court below construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

In the case of *Burgess* v. *Seligman*, 107 U. S. 20, this court stated, beginning at page 33:

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are

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established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt."

In the case of *Phelps* v. *Board of Education*, 300 U. S. 319, the position of the appellants was that by virtue of the act at issue, three years of service under contract confer upon an employee a contractual status, indefinite in duration, which the Legislature is powerless to alter.

The State Court held that whereas the statute was in one sense "perhaps contractual," it was in essence dependent on a statute which the Legislature at will might abolish, or whose emoluments it might change. This court, in affirming the decision of the State Court, stated, beginning at page 322:

"This court is not bound by the decision of a state court as to the existence and terms of a contract, the

obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employees by boards of education. Unless these views are palpably erroneous we should accept them."

III

The Amendment Provides for a Reasonable and Substantial Pension

In the *Larson* case, the appellants alleged that the pay attached to the rank of sergeant on June 5, 1951, was $371.00. Fifty per cent (50%) of said sum is $185.50. The appellee submits that the sum of $185.50 per month is a reasonable and substantial pension. It is approximately $100.00 more per month than paid under social security. There was no contract on the part of the appellee to provide appellant with her needs. She may have sufficient income to provide for her livelihood without resorting to pension funds, and, yet, she would be entitled to receive pension payments from the City of Long Beach. There was absolutely no evidence upon which the court could base a finding that the sum of $185.50 per month was not a reasonable and substantial pension.

IV

The Judgment in a Prior Declaratory Relief Action Is Not Res Judicata

The appellant Thompson contends that the judgment rendered in Case No. LBC-14131 is res judicata and fully determines the pension status between the appellant

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Thompson and the appellee, and that the electorate of the City of Long Beach was without power to adopt a charter provision amending the contract as defined by the court in said action. The appellee submits that the question as to whether the judgment is res judicata does not raise a constitutional issue, and therefore, this court will not consider the same.

If the appellee is erroneous in this statement, then the appellee submits that the facts do not support the contention of the appellant Thompson that said judgment is res judicata. The judgment in the prior action does not state that the contract existing between the appellee and the appellant Thompson cannot be further modified. The question involved in said prior action was whether the pension provisions of the City of Long Beach could be modified by a subsequent charter amendment, and whether the electorate, by adopting Section 187.1 of the charter, intended to modify the pension rights of plaintiffs named therein. The District Court of Appeal held that the pension rights of the plaintiffs named therein were subject to modification and that the electorate, by the adoption of Section 187.1, intended to modify said rights. The judgment of the court defined the contractual rights of the parties as they existed under statutes at the time the judgment was rendered. The case at issue involves the effect of Section 187.2, which section was adopted six years later, upon the pension rights of the appellant Thompson. Thus, the prior case and the case at issue involve different statutes, enacted at different times.

The law is well established in California that the rule of res judicata extends only to facts and conditions as they existed at the time the judgment was rendered and to the legal rights and relations as fixed by the facts determined by that judgment, and that when other facts or conditions intervene before the second suit, furnishing a

new basis for claims and defenses, the issues are no longer the same and the former judgment cannot be pleaded as a bar to the second action.

Lord v. *Garland*, 27 Cal. 2d 840;
Title Guarantee & Trust Company v. *Monson*, 11 Cal. 2d 621;
Lillis v. *Emigrant Ditch Co.*, 95 Cal. 553;
Babcock v. *Babcock*, 63 Cal. App. 2d 94;
Purcell v. *Victor Power, etc., Co.*, 29 Cal. App. 504;
Bank of America, etc., Assn. v. *McLaughlin*, 22 Cal. App. 2d 411;
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Natural Soda Products Company v. *City of Los Angeles*, 109 Cal. App. 2d 440;
Horton v. *Goodenough*, 184 Cal. 451

Appellee submits that the questions presented in this appeal have long been so definitely determined that no substantial questions are presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgments of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, be affirmed.

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OPPOSITION BRIEF

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No. 384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

CECELIA S. LARSON and RUSSELL T. THOMPSON,
Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,
Appellee.

ON APPEALS FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Cases:

Allen v. *City of Long Beach*, 101 Cal. App. (2d) 15, 224 P. (2d) 792 (1950), appeal dismissed, 342 U.S. 804 ....11, 13-15
Brooks v. *Pension Board*, 30 Cal. App. (2d) 118, 85 P. (2d) 956 (1938) 10
Burgess v. *Seligman*, 107 U.S. 20, 34 ..... 4, 5
Carr v. *Fire Commission*, 30 Cal. App. (2d) 208, 85 P. (2d) 959 (1938) 14
Casserly v. *City of Oakland*, 6 Cal. (2d) 64, 56 P. (2d) 237 (1936) 2, 10
Douglas v. *Kentucky*, 168 U.S. 488 4
English v. *City of Long Beach* (unreported) (Superior Court, County of Los Angeles, No. LB C-17578) 12
Indiana ex rel. *Anderson* v. *Brand*, 303 U.S. 95 .....4, 15
Kavanagh v. *Board of Police Pension Fund Commissioners*, 134 Cal. 50, 66 Pac. 36 (1901) 6, 8
Kern v. *City of Long Beach*, 29 Cal. (2d) 848, 179 P. (2d) 799 (1947) .....7 *et passim*
Klench v. *Board of Pension Fund Commissioners*, 79 Cal. App. 171, 249 Pac. 46 (1926) 2, 7
Lynch v. *United States*, 292 U.S. 571 15
Mastrofini v. *Swanson*, 114 Cal. App. (2d) 848, 250 P. (2d) 764 (1952) 3
McCracken v. *Hayward*, 2 How. 608 5
Ohio Life Insurance & Trust Co. v. *Debolt*, 16 How. 416 8
Packer v. *Board of Retirement*, 35 Cal. (2d) 212, 217 P. (2d) 660 (1950) 11
Palaske v. *City of Long Beach*, 93 Cal. App. (2d) 120, 208 P. (2d) 764 (1949) 11
Phelps v. *Board of Education*, 300 U.S. 319 4
Stearns v. *Minnesota*, 179 U.S. 223 4
Sunder v. *Collins*, 219 Cal. 430, 27 P. (2d) 382 (1933) 7
Vero v. *Sacramento City Employees' Retirement System*, 41 Cal. App. (2d) 482, 107 P. (2d) 82 (1940) 7, 10

Ordinances:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 384

CECELIA S. LARSON and RUSSELL T. THOMPSON,
Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,
Appellee.

ON APPEALS FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellee's motion, though briefed under three captions, is grounded essentially on the contention that the federal question raised by these appeals is insubstantial. Much of appellee's argument is already answered by the Statement as to Jurisdiction. We believe, however, that a summary discussion of the

constitutional issue will be of assistance to the Court, and will reveal not only that the federal constitutional question is substantial, but also that the decisions below, which denied the federal right which appellants claim, are erroneous and should be reversed.

I

The Essential Facts

The basic facts are not in dispute and can be simply stated. In 1925 the city of Long Beach, appellee herein, enacted Section 187 of its charter; that section established a pension system for police and fire department employees (Cal. Statutes, 1925, p. 1333, Jur. Statement, App. H). The amount of the pension payable after retirement upon completion of the specified years of service was a specified percentage of the annual salary paid to employees holding the rank held by the retired employee one year prior to retirement. A similar pension, in like amount, was also provided for the widow of an employee killed in line of duty. Under this system, the amount of the pension varied as the salary level changed, in order to keep the pension payments adjusted to the current value of the dollar. See *Klench* v. *Board of Pension Fund Commissioners*, 79 Cal. App. 171, 249 Pac. 46, 51-53 (1926). For example, in time of inflation when the purchasing power of the dollar is low, and salaries are correspondingly high, the pension payments are adjusted accordingly. See *Casserly* v. *City of Oakland*, 6 Cal. (2d) 64, 56 P. (2d) 237, 239 (1936).

Engebret Larson, the husband of appellant Larson, and appellant Thompson were members of the Long Beach police and fire departments, respectively. After some 18 years of service, Mr. Larson was killed in line

of duty in 1942 (Complaint, Par. II, Jur. Statement, App. E).[1] Appellant Thompson, after 22 years of service, retired in May 1951 (Complaint, Par. II, Jur. Statement, App. F). Appellant Larson was duly paid, from 1942 through June 1951, a monthly pension equal to 50 percent of the salary paid during that time to a Sergeant in the Police Department, the rank held by Mr. Larson a year before his death (Complaint, Par. III). Appellant Thompson, on his retirement on May 1, 1951, was duly paid through June 1951 a monthly pension equal to 50 percent of the salary paid to a Captain in the Fire Department, the rank held by him one year prior to his retirement (Complaint, Pars. V, VI).

Section 187 of the charter was amended in June 1951 by the addition of Section 187.2 (Cal. Statutes, 1951, p. 4635, Jur. Statement, App. G). This amendment purports to freeze, or fix, "[t]he amount to be paid as a pension to each person granted a pension prior to the effective date of this amendment, pursuant to rights thereto vested by reason of the provisions of Section 187 of this Charter * * * at the amount paid to each such person by the City on the effective date of this amendment and thereafter said pension shall be paid monthly in said fixed amount." Shortly thereafter salaries were raised in both the Police and Fire Departments, with the result that both appellants have received since June 1951 less than the amounts provided for by Section 187 itself (Complaints, Larson, Par. III; Thompson, Par. VI). These suits are for the difference.

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[1] Under state practice, although the trial court made no findings, the effect of its judgments in appellants' favor was to find in favor of appellants on all material issues in the pleadings. *Mastrofini* v. *Swanson*, 114 Cal. App. (2d) 848, 250 P. (2d) 764 (1952).

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II

The Question Involved Is Substantial

There is no dispute on the question that appellants have been substantially disadvantaged by the 1951 amendment. Stated in terms of the constitutional issue, there is no doubt that, if they had contract rights to the pensions provided by the plan as of the date their respective pensions began, those rights have been impaired. The sole issue, and the one urged by appellee in support of its motion, is that no such contract rights existed.

In deciding that issue the Court does not, of course, disregard the decisions of the state courts; indeed, the Court will "lean towards an agreement of views with the State courts if the question seems * * * balanced with doubt." *Burgess* v. *Seligman*, 107 U.S. 20, 34; see also *Phelps* v. *Board of Education*, 300 U.S. 319, 322. Nevertheless, this Court has made it plain that it recognizes an obligation to make an independent determination; otherwise it could not properly enforce the guaranty of the Federal Constitution against impairment by state legislative action. *Indiana* ex rel. *Anderson* v. *Brand*, 303 U.S. 95, 100. Particularly is this true when the contract sought to be enforced is embodied in a statute or ordinance and the party against whom it is sought to be enforced is the state or one of its political subdivisions. *Douglas* v. *Kentucky*, 168 U.S. 488, 500-502; *Stearns* v. *Minnesota*, 179 U.S. 223, 232-233.

Where, as here, there is no dispute that the enactment upon which appellants base their claim contains no reservation of a right to reduce pensions once granted, and when the issue is therefore whether such a reservation is to be implied, there is also, of necessity,

a further limitation on the extent to which the views of a state court are significant. A state court decision authoritatively construing a state enactment *before* the time when rights under it are alleged to have ripened into a contract stands on a different footing than a state court decision which construes a state enactment *after* that time. In the one case, the decision may be said to have added a gloss to the enactment itself, and parties who thereafter bring to final fruition their rights under the enactment may be taken to have contracted in the light of both the enactment and the decision. In the latter case, the state court is doing no more than determining whether a given set of facts which have already happened has created, or failed to create, the contract right alleged. It has no better basis for judgment than this Court on that issue. The difference is noted in *Burgess* v. *Seligman, supra,* at pp. 33-34:

> "So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

See also *McCracken* v. *Hayward,* 2 How. 608, 612.

In the instant case, there is one more qualification which should be noted. Because of the small amount of money in issue, the decision of the court below is not subject to review by California's highest court. Indeed, as will appear in the discussion below, one of the issues is as to the meaning of the opinions of the Supreme Court of California. Again, the court below

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is in no better position to make that interpretation than is this Court.

Is there, then, in the light of these principles, a substantial question presented by the cases of these two appellants?

In the case of appellant Larson, the contract upon which she bases her present claim was created, if it was created at all, in 1942, when the death of her husband became the final event necessary to fulfill the conditions of the pension plan, and to entitle his widow to the payments as therein specified.

Appellee urges, however, that it was not created—or at least that it was subject to the implied condition that the amounts to be paid under the contract could thereafter be substantially reduced. Its contention is based upon certain California decisions, which are discussed below. What is important to note, however, is that appellee's brief in support of its motion cites *no California case whatever* on this issue decided *before* appellant Larson's rights matured in 1942. The reason is not far to seek; the "gloss", if any can be said to exist as of that date, is directly contrary to appellee's assertion of an implied right to modify contracts once they have matured. The California decisions prior to 1942 are uniform, and unambiguous, that under a pension plan such as that here involved the happening of the last event required under the pension plan creates a contractual right which is beyond the power of the legislative authorities to impair. As early as 1901, in *Kavanagh* v. *Board of Police Pension Fund Commissioners*, 134 Cal. 50, 66 Pac. 36, the Supreme Court of California upheld a widow's claim to a death benefit payment provided for under a statute in effect when her husband died in 1897 and rejected a defense based

on a statute of 1900 which repealed the former statute, stating (66 Pac. at p. 37):

> "Respondent's right, therefore, became vested while the statute under which she claims was in full force, and it was not competent for the legislature, or any other authority, to deprive her of that vested right."[2]

Between 1901 and 1942, although the question was apparently never again squarely raised, the California courts on numerous occasions reiterated that principle. See, *e.g.*, *Klench* v. *Board of Pension Fund Commissioners*, 79 Cal. App. 171, 249 Pac. 46, 50 (1926); *Sunder* v. *Collins*, 219 Cal. 430, 27 P. (2d) 382, 383 (1933); *Vero* v. *Sacramento City Employees' Retirement System*, 41 Cal. App. (2d) 482, 107 P. (2d) 82, 84 (1940).

In 1942, therefore, when the rights of appellant Larson were finally established, both Section 187 and the California decisions established a right securely rooted in a contract and beyond the power of appellee to modify.

Appellee does not, and cannot, challenge these facts. Its sole reliance is bottomed on a claim that later—in 1947—the Supreme Court of California reversed its prior opinion and decided that an implied reservation of a right to reduce pensions had always existed. *Kern* v. *City of Long Beach*, 29 Cal. (2d) 848, 179 P. (2d) 799. Whether such a judicial reversal, had it in fact occurred, could be effective to deprive appellant Larson of rights which she already had would in itself present

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[2] The California Supreme Court later noted that the pension plan involved in the Kavanagh case was of the same nature as that created by Section 187. *Kern* v. *City of Long Beach*, 29 Cal. (2d) 848, 179 P. (2d) 799, 801 (1947), quoted infra, p. 8.

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a substantial federal question. See *Ohio Life Insurance & Trust Co.* v. *Debolt,* 16 How. 416, 431-432. It is, however, one which need not be reached in this case, for the decision upon which appellee relies did not *decide* the question at all, and the opinion, when read as a whole, does not support appellee's claim.

At issue in the *Kern* case was the constitutionality of a 1945 amendment to Section 187 which, in effect, abolished the pension plan in its entirety (Section 187.1, Cal. Statutes, 1945, p. 2954, Jur. Statement, App. I). Kern, the plaintiff in the action, had not retired at the time that the 1945 amendment became effective, nor was he then eligible to retire. The issue, in other words, was whether, as applied to non-retired employees who were still continuing to work, the city had the power to repeal its pension system. The court held that it did not.

The opinion in the *Kern* case is in no sense ambiguous in thus defining the precise nature of the question before the Court. It begins by noting that in some states pensions for government employees are held to be bounties which can be withdrawn at any time, but that in California such had not been the rule (179 P. (2d) 800-801). It then proceeds with an express quotation from, and reaffirmation of, the *Kavanagh* case (see p. 6, *supra*) stating (*id.* at p. 801):

> "It is settled in this state that pension rights acquired by public employees under statutes similar to the Long Beach charter become vested as to each employee at least upon the happening of the contingency upon which the pension becomes payable."

Having made that point clear, the court continues (*ibid*):

> "It is contended by the city, however, that petitioner did not acquire any vested right to a pension because he did not complete the prescribed period of service prior to the time the pension provisions were repealed. It is therefore necessary to ascertain whether any rights vested prior to the repeal and, if so, the nature and extent of those vested rights."

During the discussion of *that* issue—which is, of course, not the issue presented here—the court made two statements by way of dictum upon which appellee here relies. The first, made in the course of a discussion of the doctrine that pension rights of not-yet retired employees are subject to reasonable modification (although not to outright repeal) is as follows (*id.* at pp. 802-803):

> "It has also been held that a pension could be reduced prior to retirement from the two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence."

Appellee, in construing the statement as support for its position, reads the phrase "modifications have been approved" in this statement as meaning "reductions have been approved" or "impairments have been improved". Not only does the statement not so state, but to construe it as appellee does would make it flatly inconsistent with other statements in the opinion. Moreover, and perhaps even more importantly, the cases which are cited for the statement show that appellee has misunderstood its meaning. None of the seven cases to which the court makes reference hold that the obligation of a pension plan contract can be reduced or

impaired "after the happening of the contingencies upon which the payments were to be made." At least two of the seven cases contain statements in the opinions which are precisely to the contrary. See *Brooks* v. *Pension Board*, 30 Cal. App. (2d) 118, 85 P. (2d) 956, 958 (1938); *Vero* v. *Sacramento City Employees' Retirement System*, 41 Cal. App. (2d) 482, 107 P. (2d) 82, 84 (1940). As a statement of what other cases have held, in other words, which is all the statement purports to be, the opinion cannot be read as appellee reads it without making it simply erroneous.[3]

The second dictum to which appellee refers is a statement made in support of the court's conclusion that under Section 187 there were some rights which "vested" before, as well as after, the final contingency occurred which entitles the employee to a pension. The Court said (*id.* at p. 803):

> "Insofar as the time of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due."

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[3] There can be, of course, no constitutional objection to a "modification" of a contract which increases, rather than decreases, the state's obligation—*i.e.*, which does not impair its obligation. Moreover, it is possible that the *amount* of a pension might be reduced without impairing the obligation of the pension contract. In *Casserly* v. *City of Oakland*, 6 Cal. (2d) 64, 56 P. (2d) 237 (1936), which was one of the seven cases cited in support of the court's statement, a pension plan substantially identical with that here involved was in issue. The claim was made that a widow's pension could not be reduced even when the corresponding salaries to which it was related were cut. The contention was rejected. No impairment of the contract was involved, as is the case here, since the reduction was in strict accord with the provisions of the contract. See 56 P. (2d) at p. 239.

As a statement of rationale for the decision invalidating the total abolition of Section 187, the statement cannot be challenged. As an authority in support of appellee's position, however, it is clearly inapposite. Not only is it discussing only the "time of vesting", but in the same paragraph the court continues:

> "* * * the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened * * *."

The court below states (Jur. Statement, App. A) that it came to its conclusion after a reading of the opinion not only in the *Kern* case but also in three later cases—*Packer* v. *Board of Retirement*, 35 Cal. (2d) 212, 217 P. (2d) 660 (1950); *Palaske* v. *City of Long Beach*, 93 Cal. App. (2d) 120, 208 P. (2d) 764 (1949); and *Allen* v. *City of Long Beach*, 101 Cal. App. (2d) 15, 224 P. (2d) 792 (1950), appeal dismissed, 342 U.S. 804. In each of the three later cases, however, the issue was similar to that involved in the *Kern* case, *viz*: the rights of the employees who had not retired and were not eligible to retire at the time of the challenged modifications of the pension plan. They could not decide, and did not purport to decide, the issue presented here.

We submit, therefore, that in view of the unqualified approval which the California Supreme Court gave to the *Kavanagh* case in the *Kern* opinion as quoted above, and in view of the fact that appellee relies upon dicta which are at best ambiguous and are inconsistent

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with far less ambiguous statements elsewhere in the opinion—and, if read as appellee seeks to read them, are to some extent demonstrably erroneous—it cannot be said that the decision or opinion in the *Kern* case has taken away, in 1947, the rights which appellant Larson unquestionably had in 1942. At the very least, whether it has done so is a question of substance; we submit that in fact it has not done so, or purported to do so, and that the decision by the court below sanctions a substantial impairment of appellant Larson's rights, and should be reversed. It is also significant that on June 4, 1953, following the decision of the court below, a judge in another department of the Superior Court of Los Angeles has held the reduction authorized by Section 187.2 unconstitutional as to another retired pensioner. *English* v. *City of Long Beach* (unreported, No. LB C-17578).[4]

The case of appellant Thompson differs from that of petitioner Larson in two respects. First, since he did not retire until 1951, it may be said that the decision in the *Kern* case in 1947 was, as to him, a gloss on the pension plan which modified his contractual rights during the period before the happening of the final contingency which perfected his contract right. For the reasons already stated in discussing the *Kern* case above, we believe that it cannot be said to have had any such effect. Isolated statements unnecessary to the decision, which if read to support appellee's contention are partly erroneous and are at best wholly ambiguous, coupled with unambiguous statements reaffirming a frequently-stated, 50-year old, rule, cannot reasonably be said to supply a basis on which Thompson should

[4] Nine copies of the careful, reasoned, memorandum opinion of Judge Nourse in this case have been lodged with the Clerk.

have known that after 1947 his pension rights were no longer what they had been—an undertaking by the city to pay upon retirement, after 20 years of service, in accord with the terms of Section 187, but were rather something wholly different—an undertaking by the city merely to pay *something,* but not necessarily as much as it appeared to offer by the terms of its charter.

Moreover, neither appellee nor appellant Thompson could in fact have so believed that appellant Thompson's rights were affected by the *Kern* case. *Before* he retired, but *after* the *Kern* decision, he was one of numerous plaintiffs in *Allen* v. *City of Long Beach, supra.* The issue in that case was of course different from the issue here; none of the plaintiffs had yet retired, and their claim was bottomed on the argument that even *before* retirement they were entitled, under the *Kern* case, to object to certain modifications (not here involved) which had been made in the pension plan as being unreasonable. Although that claim was denied, the court entered a judgment (Jur. Statement, App. F, Exh. A) which in direct language stated the rights of the plaintiffs, including petitioner Thompson:

> "IT IS ORDERED, ADJUDGED AND DECREED that the repeal of Section 187 of the Long Beach City Charter by the terms of Section 187.1 thereof has no binding force or effect upon the respective rights of any of the plaintiffs above named to earn and receive the various pension benefits provided by Section 187 of said City Charter and that their respective rights to earn and receive the various benefits provided by Subdivisions (2), (3) and (4) of said Section 187 are and were contractual in nature and hence within the protection of the provisions of Article I, Sections 13 and 16 of the Constitution of the State of California and of Section 10 of Article I of the Constitution of the

> United States as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations, provided, however, that said contractual rights are limited, with respect to a retirement pension, to an annual pension equal to one-half of the salary attached to the rank held by such plaintiff or plaintiffs one year prior to the date of their respective retirements, and no more."

Appellee concedes in its brief (p. 19) that:

> "The judgment of the court defined the contractual rights of the parties as they existed under statutes at the time the judgment was rendered."

Any modification of the statute which might conceivably have been created by the *Kern* opinion was thus effectively eliminated.

It might be added that the City of Long Beach, which was appellee there as well as here, in successfully urging in this Court that the question of the validity of the changes in Section 187 as applied to *non*-retired employees was not substantial, quoted with approval in its Statement Opposing Jurisdiction, many California cases which state the rule for which we now contend, *e.g.* the "pension law may be changed or modified so long as the vital contingency has not happened upon which an employee may predicate his right to a pension" (*Carr* v. *Fire Commission*, 30 Cal. App. (2d) 208, 211, 85 P. (2d) 959, 960 (1938)). Statement Opposing Jurisdiction, No. 155, October Term, 1951, p. 12. See also, *id.*, pp. 9, 10, 11, 12, 13. Appellee's Statement

Opposing Jurisdiction in *Allen* v. *City of Long Beach, supra,* states the California rule as follows (p. 7):

> "However, it is well established, under the minority [California] rule, that no vested rights are infringed upon by a modification or amendment of the pension statute *if such modification takes effect before the happening of the contingency which entitles the employee to receive a pension.*" (Italics supplied.)

We believe that to be a correct statement. The *Kern* case had then been decided and was cited and quoted in appellee's brief (pp. 3, 13-14). In the light of that statement, and of the judgment which judicially defined appellant Thompson's rights, it simply cannot now be argued persuasively that Section 187 had been given, as to him, the drastic judicial modification for which appellee contends—that it was no longer a firm contract, but one which could be unilaterally amended.

It remains only to note the several decisions cited by appellee which arose in jurisdictions other than California. They are, for that very reason, of no application here. Many states, it is true, have adopted the rule that a pension is a mere bounty which may be given, withheld or modified, at the discretion of the public authorities. In such states no contract right can arise. In California, however, pension statutes are not subject to any such statutory or judicial gloss; they are regarded as creating not mere bounties, but contracts, upon the happening of the final contingency. And such contracts are, like any others, protected against impairment by the Federal Constitution. *Lynch* v. *United States,* 292 U.S. 571; *Indiana* ex rel. *Anderson* v. *Brand,* 303 U.S. 95.

CONCLUSION

We submit, therefore, that appellee's motion should be denied.

Respectfully submitted,

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Of Counsel.

October 3, 1953